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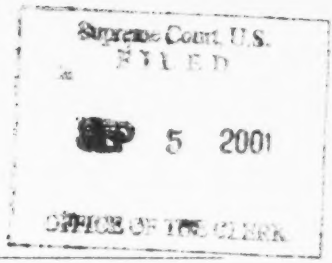

IN THE SUPREME COURT OF THE UNITED STATES

JOSE ANTONIO GUZMAN, *Petitioner*

v.

FEDERAL EXPRESS CORP., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

FedEx Corporation, f/k/a FDX Corporation, is the Parent Corporation of Respondent Federal Express Corporation.

TABLE OF AUTHORITIES

FEDERAL CASES

Murphy v. UPS, 119 S. Ct. 2133 (1999) 5, 6, 7, 20

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ARGUMENT AGAINST GRANTING CERTIORARI

The respondent Federal Express Corporation submits that the petition for writ of certiorari should be denied because there are no compelling reasons for granting the requested review. In fact, while not controlling, the petition does not meet any of the criteria specified in Supreme Court Rule 10. Furthermore, Petitioner's stated justification for requesting certiorari is based on misstated facts and a fundamental misunderstanding of the rationale applied in the lower courts. Contrary to Petitioner's assertion, Petitioner has failed to demonstrate that this Court's holding in *Murphy v. U.P.S.*, 119 S. Ct. 2133 (1999) requires clarification, or is otherwise misunderstood or confusing to the lower courts. Petitioner is simply unhappy with the result in his particular case.

Petitioner originally filed suit alleging, inter alia, that Respondent discriminated against him and terminated his employment because he was "regarded as" disabled. In granting summary judgment in favor of Respondent, the

United States District Court for the Northern District of Texas applied the holding in *Murphy* and held that because Respondent only disqualified petitioner from a single job, and because Respondent in fact offered Petitioner at least one other position, Respondent did not regard Petitioner as disabled. The Fifth Circuit Court of Appeals affirmed summary judgment in favor of Respondent.

Petitioner asserts that the Fifth Circuit was confused by this Court's discussion of the "regarded as" prong of a claim under the American's with Disabilities Act and that without clarification of the appropriate standard, "a major portion of the ADA will be rendered meaningless." Specifically, Petitioner alleges that the lower courts "did not understand that *Murphy* dealt with only a single job and that the entire purpose of the 'regarded as' section of the definition is defeated if the employer can ban the employee with an impediment from all its jobs because he has an infirmity that prevents him from performing his single job." Petition at p. 22.

This statement of Petitioner is based on his mistaken reliance on a severely twisted version of the facts. In essence, Petitioner argues that Respondent placed unusual conditions on him when offering him alternative positions which were compatible with Petitioner's medical condition, and that these conditions were "knowingly designed to be unacceptable to him." Petition at p. 21. Petitioner then argues that because conditions were placed on the offers of other positions, Respondent must have regarded Petitioner as incapable of performing all of its jobs. This argument is nonsensical and ridiculous. Furthermore, as set out more completely below, the evidence clearly demonstrates that Petitioner was offered alternative employment and that Respondent did not regard him as disabled.

In addition, Petitioner makes a statement in his brief which proves that this case does not warrant the granting of a writ of certiorari. In summarizing the opinion of the Fifth Circuit and its reliance on *Murphy*, Petitioner states: "The Murphy case, when correctly read, says no such thing . . ."

Petition at p. 22. The fact that in Petitioner's opinion, the *Murphy* decision is capable of being correctly read militates against Petitioner's claim that certiorari is warranted. Moreover, contrary to Petitioner's assertion, it is apparent from the opinion itself that the *Murphy* case involved only the plaintiff's exclusion from a single job for medical reasons. That is precisely the fact situation involved in the case at bar. Petitioner does not dispute that he was not physically qualified for his former position as a commercial truck driver due to his seizure episode. Petitioner was offered at least one other position that did not conflict with this restriction; however, Petitioner refused the position. The lower courts correctly determined that Respondent satisfied its burden under the ADA and that it did not regard Petitioner as disabled.

In order to set the record straight in the event this Court grants the Petition, the following is Respondent's rendition of the facts of this case.

STATEMENT OF FACTS

A. GUZMAN'S EMPLOYMENT WITH FEDEX

Guzman (Petitioner) drove an "18 wheeler" for FedEx. (R. 568). He worked a full-time job as a "ramp transport driver" at FedEx's DTK station, which is located in Irving, Texas; there, he worked the early a.m. shift transporting, delivering, and picking up heavyweight freight. (R. 519, 600). He was an at-will employee. (R. 519, 600, 611).

B. GUZMAN'S MEDICAL EVENT

On February 15, 1998, Guzman suffered some sort of medical event; it has been alternately called a "seizure," "suspected seizure," and Guzman's present condition." (R. 619, 620, 755). Regardless of the label, Guzman stipulates that as a result of this medical event, he could not drive professionally for two years. (R. 581). Also based on this medical event, Guzman's doctor had him take time off from work.

FedEx learned of this event from Guzman and his doctor (R. 688, 703, 755). This includes the assertion from Guzman's doctor that Guzman "has been disabled." (R. 701).

C. GUZMAN'S LEAVE OF ABSENCE

Based on the information provided by Guzman and his doctor, FedEx placed Guzman on a medical leave of absence. Guzman's medical leave was consistent with FedEx's written leave of absence policy. (R. 600).

On March 19, 1998, Val Parrish, FedEx's Human Capital Manager, gave Guzman written notice of terms and conditions of FedEx's leave of absence polity, including Guzman's responsibilities under this policy. (R. 599, 615). In the last paragraph of this letter, Parrish specifically notified Guzman that FedEx had a temporary return to work ("TRW") program:

> Part time and full time employees are eligible to participate in the Temporary Return to Work Program. This would allow part time employees to work up to 21 hours per week or full time employees to work up to 28 hours

> per week if your physician releases you to light duty and there is light duty available in your work group .... (R. 615).

D. GUZMAN REFUSES TO RETURN TO WORK, INSISTING ON A FULL-TIME JOB[1]

On March 13, 1998, Guzman's treating physician gave him a written release to return to work. (R. 618). This release, however, contained two restrictions. First, Guzman's doctor told him in writing that he could work only "in day time hours." (R. 618). Second, Guzman's doctor told him in writing, "You should be in a non-driving position." (R. 537, 618). Guzman's doctor wrote similar releases on May 12, 1998, and on June 19, 1998. (R. 619, 620).

During Guzman's leave of absence, Parrish continually looked for a position for Guzman. (R. 601). As

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[1] Guzman acknowledged in his deposition that "all jobs are bid unless you are in management." (Among other things, a "bid" is a written application.) Despite this knowledge, and despite what he calls on page 4 of his Brief his "familiarity with most of the various jobs the Company

shown below, however, Guzman was adamant that he work in a full-time position; Guzman made it clear that he did not want to work in a part-time position. (R. 601).

1. Guzman Rejects FedEx's First Offer

In May of 1998, Parrish offered Guzman a job as a Customer Service Agent ("CSA"). (R. 600). There is no dispute that the job was consistent with the instructions of Guzman's treating physician. (R. 600). However, the CSA job was part time. (R. 600). Guzman rejected this offer because he insisted that FedEx give him a full-time job. (R. 600, 601).

2. Guzman Rejects FedEx's Second (Full time) Offer

On November 10, 1998, Parrish extended another job offer to Guzman. (R. 601). This time, the offer was made in writing. (R. 621). The job that Parrish offered to Guzman was entitled, Freight Handler (Non-DOT). (R. 601). This

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had in the Dallas area," Guzman never submitted a written application or "bid" for another position during his entire leave of absence.

job had the following features, which made it seem like a good fit for Guzman:

- ✓ *First,* the job was a full-time job, which is what Guzman had insisted on for months. (R. 601).
- ✓ *Second,* the job was within Guzman's education and experience. (R. 601).
- ✓ *Third,* the job was consistent with the instructions of Guzman's health care provider. (R. 619, 620).
- ✓ *Fourth,* the job was in Dallas-Fort Worth area (the DTK-RT station). (R. 601). Indeed, this job was in the very same department where Guzman worked before February 16, 1998. (R. 520).
- ✓ *Fifth,* the job paid the same salary as his previous job driving an "18-wheeler." (R. 601).

Page 6 of Guzman's summary judgment response puts it best: "[t]his was the same type work [Guzman] had been doing as a driver – without the driving." (R. 482).

What Parrish asked in return was that Guzman stay for 18 months in that department (R. 601); however, as previously noted, this was the very same department where Guzman worked before February 16, 1998. Even this term

was mitigated by the fact that Guzman was eligible to apply for any other job within that department after six months. (R. 601). This eligibility included driving jobs (once his driving restrictions were lifted). (R. 520).

Guzman refused this offer, too. (R. 601, 625). This time, Guzman's refusal came in the form of a letter from his attorney, who offered the following explanation for Guzman's refusal:

> He [does] not desire to expect [sic] that position as offered, primarily because of the eighteen (18) month commitment and other commitments required of him if he did so. (R. 625).

The letter does not identify these "other commitments."

3. *Guzman Rejects TRW Assignment*

On March 8, 1999, Parrish sent Guzman a letter notifying him of a temporary return to work ("TRW") assignment at FedEx's DTK facility. (R. 629) (Prior to the seizure, Guzman worked at the DTK facility.) The TRW assignment was consistent with FedEx policy that Parrish

had explained to Guzman in a letter almost one year earlier. (*See* last paragraph of letter dated March 19, 1998, discussed previously.) (R. 599, 615). The TRW assignment was also consistent with the limitations imposed by Guzman's treating physician. (R. 619, 620). Finally, the TRW assignment guaranteed to Guzman compensation that was equal to his disability insurance benefit. (R. 521, 602).

Parrish's letter of March 8, 1999 also contains the following admonition:

> **The TRW Program is not voluntary. Employees assigned to the TRW Program must participate.**

(emphasis added). (R. 629). Parrish's letter goes on to cite written policy, which provides that employees who are absent without notifying their manager or member of management in their work area are treated as if they have voluntarily resigned their employment. (R. 629).

Guzman refused to work in the TRW program as instructed. In communicating his refusal, Guzman did not provide any doctor's instructions showing that he was unfit

to work. Nor did Guzman provide any other reason why he was unable to comply with Parrish's instructions.

Plaintiff's Summary Judgment Response states that Guzman elected not to file an internal grievance – called a GFTP – over any of the terms of the TRW program (R. 489). Logically, this would include whether the TRW Program is mandatory of permissive. Also, Guzman never challenged Parrish's assertion that the TRW program was mandatory before the EEOC.

Following up Guzman's refusal to participate was a letter from his attorney, dated March 15, 1999. (R. 708). In this letter, Guzman's lawyer wrote that "there are too many unanswered questions for him to accept the part-time, temporary job that has been offered." (R. 708). Also, in this letter, Guzman's lawyer reiterated his client's insistence on having nothing less than "a full-time job with full-time benefits."

Despite Guzman's refusal, Parrish made another effort to explain the TRW program to Guzman. (R. 630-32).

Dated March 22, 1999, Parrish's letter outlines pay, benefits, and other features. It also reiterates the following: **Participation in the TRW Program at FEDEX is MANDATORY.** (emphasis in original). (R. 632).

Parrish wrote still another letter, this one dated March 24, 1999. (R. 633-34). Once again, Parrish stated:

> Tony in my 03/08/99 letter, I explained Temporary Light Duty is not voluntary. Employees assigned to the TRW program must participate. (R. 633)

Parrish's letter went on to warn Guzman:

> You are considered as on unauthorized absence/leave of absence. Each day of absence since March 10, 1999 will be calculated into your attendance. (R. 633)

This letter practically plead with Guzman to participate:

> Tony, it is imperative that you understand you are in violation of Medical Absence/Medical Leave of Absence Policy, P&P 1-5, Acceptable Conduct Policy, P&P 2-5. Your failure to return to

> work Temporary Light Duty jeopardizes your STD/LTD medical benefits and disciplinary action up to and including termination will result. (R. 633)

In this letter, Parrish tried to give Guzman what page 12 of his summary judgment response called "one last opportunity to report for temporary duty[.]" (R. 488). Specifically, Parrish instructed Guzman to show up at ten o'clock in the morning on March 26 at the DTK ramp (his old work place). R. 633). Parrish's letter closes by stressing the urgency of the situation:

> ***Once again, participation in the TRW Program is mandatory. Failure to comply with my request will result in your Leave of Absence Status being in jeopardy. I have also attached a copy of the Medical Absence/Leave of Absence Policy, P&P 1-5 and Temporary Light Duty Policy, P&P 1-68. Failure to return to work or provide medical documentation substantiating your absence can result in discipline up to and including termination.*** (emphasis in original). (R. 634).

Guzman responded to Parrish's letters of March 22 and 24 by suing FedEx. In a letter dated March 26, 1999, Guzman – again, through his lawyer – attempted to justify his refusal to comply with Parrish's instructions by asserting that he is entitled to nothing less than a full-time job. (R. 635). Guzman's attorney then stated:

> It is apparent that the Company is treating Mr. Guzman as a disabled employee.... Regarding an employee as disabled is treated the same under the Americans With Disabilities Act ("ADA") as though the employee were actually disabled – which requires reasonable accommodation by the Company. (R. 635).
>
> Mr. Guzman filed a Charge With the Equal Employment Opportunity Commission complaining of the Company's violation of ADA....[2]

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[2] The EEOC Charge, filed on January 11, 1999, reads in pertinent part:

> I have been continuously denied a reasonable accommodation in that I have been denied the opportunity to return to work in a full-time non-driving position. .... I believe I have been and continue to be discriminated against because the company regards me as a person with a disability ... in that I have been denied the opportunity to return to work in a full-time non-driving position. (R. 662).

> Yesterday, Mr. Guzman filed suit.... (R. 636).

Citing Guzman's repeated refusals to comply with instructions, Parrish wrote a letter to Guzman on March 31, 1999, informing him that his employment was terminated. (R. 637). In the same letter, Parrish advised Guzman that if he in good faith believed this termination was unfair, Guzman could use FedEx's internal grievance procedure, the GFTP process. (R. 637). Guzman never did.

CONCLUSION

Petitioner has failed to demonstrate that this case warrants the rather extreme measure of granting a writ of certiorari. This Court's opinion in *Murphy v. UPS* does not require clarification. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." At worst, Petitioner has only demonstrated that he is dissatisfied with the factual conclusion reached by the lower courts that

Petitioner was indeed offered other employment by Respondent, and that as a result of that factual finding, Respondent obviously did not regard Petitioner as disabled.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen R. Cochell, a member of the Bar of this Court, hereby certify that on this 5th day of September, 2001, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed, first class postage prepaid, to counsel for Petitioner, addressed as follows:

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